



**Testimony of Anne M. Northup
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**Hearing: "The Views of the Independent Agencies
on Regulatory Reform"**

Before the

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

Subcommittee on Oversight and Investigations

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Chairman Stearns and Ranking Member DeGette, thank you for the opportunity to provide testimony to this Subcommittee on the response of our independent agency, the Consumer Product Safety Commission (CPSC), to the Administration's goal of regulatory reform.

Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, said recently in an op-ed for *The Wall Street Journal*: "This insistence on pragmatic, evidence-based, cost-effective rules is what has informed our [the Administration's] regulatory approach over the past two and a half years."¹ Unfortunately, this cannot be said for the CPSC. Although the Commission is a relatively small agency (FY 2011 budget of \$114.8 million), the agency's actions over the last two and one half years to implement the Consumer Product Safety Improvement Act of 2008 (CPSIA) have substantially added to the economy's woes, causing small businesses to leave the children's product market, reduce jobs, and/or close.

Since the beginning of 2009, the Commission has focused its time and resources principally on implementing the CPSIA. My testimony today will focus on the devastating impact the law and its regulations are having on American business growth and competitiveness, all with little or no offsetting improvement in product safety. I will also discuss the opportunities the Commission's Majority has failed to take to reduce the law's burdens when the statute has allowed such flexibility.

Finally, I will also propose today, as I did before a hearing of the Commerce, Manufacturing and Trade Subcommittee, specific actions that this Committee and Congress can take to ameliorate the CPSIA's effects. With regard to Mr. Sunstein's and this Committee's calls for independent agencies to voluntarily review burdensome or outdated regulations for potential reforms, I am unaware that our Chairman has responded. I know that, notwithstanding my request to contribute to the formulation of any Commission views on the subject, she has not asked for my input. Thus, without a willingness on the part of our Chairman or the Commission's Majority to proactively seek cost-benefit analyses of our rules and/or to roll back unnecessary parts of our rulemakings put forth to implement the CPSIA, only Congress will be able to stop the damage.

I. The CPSIA:

Background

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. In January 2010, the Appropriations Committees of the House and Senate requested

¹ Cass Sunstein. "21st Century Regulation: An Update on the President's Reforms," *The Wall Street Journal*. May 25, 2011.

<http://online.wsj.com/article/SB10001424052702304066504576345230492613772.html>

a Report from the five Commissioners 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*). Most recently, the Commerce, Manufacturing and Trade Subcommittee voted to approve a bill to reform the CPSIA, which may soon be marked-up by the full Energy and Commerce Committee. Thus, the law no longer enjoys the broad support it received in 2008.

Unfortunately, neither the Commission's Democrats nor the law's original Democrat supporters in Congress have shown interest in any more than minor tweaks to the statute, which will not address small businesses' concerns. Democrats at the Commission acknowledge and even sympathize with the many requests for relief that we receive from small businesses, but have missed numerous opportunities to implement the statute in a less burdensome way. They blame the statute for being too inflexible, but do not request, even when asked, more than negligible relief from Congress. At the same time, the law's strongest supporters in Congress blame the Commission for not using the flexibility in the law. Meanwhile, nothing changes and the statute and its regulations continue to undermine the economic recovery.

It's not about safety: The CPSIA's non-risk based requirements

While the Commission's budget has grown substantially since the law's passage in 2008 (by nearly 44 percent), new and old resources have been 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 one 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, without any likely safety benefit, due to the Commission's flawed database regulation.² While consumers have always been able to report to the CPSC experiences of harm or risk of harm involving a consumer product, such reports were not made public unless the CPSC took reasonable steps to ensure accuracy. That is why this Committee's draft CPSIA reform bill has called for changes to ensure that incident reports published in the database are at least verifiable. Potentially inaccurate and unverifiable information on a public database is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information. If this Commission is to have a public database funded by taxpayers, it should be *different and better* than any source of information that already exists in the public domain, such as websites like Amazon.com or Yelp.com. Many believe the Commission's ".gov" database, if left unchanged, will be useful only to trial lawyers or advocacy groups that will be able to populate it with unverifiable, second-hand information for their own purposes.

II. Economic Impact of the CPSIA

The lack of cost-benefit analyses

In March 2009, Commission staff reported that the economic costs associated with the CPSIA would be "in the billions of dollars range."³ 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.

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. **Attached** is a sample list of businesses impacted by the CPSIA, as well as other economic data. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and

² The Commission Majority's database rule suffers from three major infirmities: 1) It interpreted the statute to allow *anyone* to report incidents to the database—even consumer advocacy groups, trial lawyers, and others with ulterior motives and who may not have firsthand knowledge of the incident; 2) the rule fails to require enough information from submitters so that reports are even verifiable; and 3) the rule requires that all reports will be made public on the 10th day following transmittal to the manufacturer, regardless of whether there's a pending, valid claim of material inaccuracy.

³ Letter from Acting CPSC Chairman Nancy Nord to Representative John Dingell, March 20, 2009.

Labeling Rule. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.⁴

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. It has long been established that the lead absorbed by children overwhelmingly comes from leaded paint or from lead in gasoline that got into the dirt and was tracked into homes near older gas stations. 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.⁵ Similarly, 2007 data indicates that one percent of children selected nationwide for testing, who are targeted due to their higher risk profile, showed an elevated blood lead level as established by the CDC. This number was down from nearly eight percent in 1997,⁶ and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the 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.

Burdensome testing and certification requirements on manufacturers

Given the tools available to manufacturers to determine compliance and our own improved enforcement methods, I do not believe the complex, third-party testing and certification requirements of the CPSIA are necessary or helpful to ensure compliance with the law's new requirements. In fact, relief from the law's testing requirements is the number one request of small businesses, many of whom may be able to comply with the law's lead and phthalates limits but still cannot afford the mandatory third-party testing.

By requiring all manufacturers of children's products to send their products to be tested at a third-party lab, regardless of risk, the law disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation. The CPSIA's micromanagement of a company's testing, certification and tracking of each and every component of a product is entirely unnecessary—and in fact, will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. Furthermore, a "bad actor" with a

⁴ Most of the CPSIA mandated regulations are **not required** to be promulgated under Section 9 of the CPSA, which normally would entail a cost-benefit analysis. However, the statute does not **prohibit** the agency from doing so, if the Commission recognizes a need for such analyses.

⁵ http://www.epa.gov/opeedweb/children/body_burdens/b1-graph.html

⁶ <http://www.cdc.gov/nceh/lead/data/national.htm>

casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications.

The CPSIA also requires the creation of massive new paperwork and tracking systems, often without any safety enhancing product changes. A member of the American Home Furnishings Alliance reported that it spent \$13 million dollars on tests, new systems and tracking processes, despite the fact that every single component it used on children's furniture already complied with the current lead standard. The company was therefore not required to change a single material used in its manufacture of children's furniture, and there was no corresponding benefit in the improved safety of its children's furniture to justify the costs.

Similarly, some industry associations have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in its 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 testing and certification requirements of the law have yet to be fully implemented. Therefore, I would continue to request that Congress intervene to prevent the Commission from enforcing these requirements, at least until a full cost-benefit analysis has been performed.

III. Commission Actions Have Made the Law's Impact Worse

I no longer believe that action by the Commission to alleviate the law's unnecessary burdens is likely. Before my Senate confirmation hearing, I was asked by both Democrat and Republican Senators to "find flexibility" in the law wherever possible, because the law had resulted in many unintended or unforeseen consequences. Once confirmed as a Commissioner, I took this request seriously.

However, the flexibility that I have found in the following rules was rejected by a majority of Commissioners:

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

- Absorption exclusion:** I argued that the absorption *exclusion* under Section 101 was actually intended to exclude certain products from the lead limits (rather than be meaningless), and therefore that the term “any lead” in that section may be interpreted to mean a *de minimis*, harmless amount of lead in a children’s product. If the Commission had accepted my interpretation, lead in the substrate of ATVs, bicycles, and brass axles on toys would be legal—since lead in the substrate of these products is not harmful. This interpretation would have allowed American standards to mirror European standards more closely and reduced the number of components that need to be tested. Because the Commission rejected this interpretation, it voted to reject the petition of a manufacturer of toy cars, even though the car’s brass fitting contained less absorbable lead than the Food and Drug Administration deems to be acceptable in a piece of candy.⁸
- Civil Penalties Factors** – In the Commission’s interpretive rule on Civil Penalties Factors, I proposed a number of changes to provide more certainty for the regulated community and to ensure that, while the overall civil penalty ceiling was raised, “technical” violations, such as incorrect paperwork, would not be treated the same way as more serious violations, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.⁹ Unfortunately, a majority of the commissioners did not want to provide that leeway.
- Definition of Children’s Product** – The CPSIA applies to all “children’s products”, statutorily defined as products “primarily intended for a child 12 years of age or younger.” The comments that the Commission received following the proposed rule made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children’s products intended for ages 10-12 or for an age range falling both inside and outside the upper age limit of 12. The purpose of defining the term was to guide manufacturers in determining which of their products fall within the purview of the CPSIA. After receiving these comments, the Commission had a chance to put a much narrower “fence” around the scope of covered products—or to at least define clearer boundaries. Unfortunately, the Majority chose to leave the definition vague whenever possible, which helps neither the CPSC staff,¹⁰ nor the regulated community.¹¹
- “Children’s product safety rules”** – I offered a valid, alternative interpretation of the statute with regard to the requirement to impose third-party testing on all “children’s product safety rules.” A clear distinction can be made between “children’s product safety rules” and more general “consumer product safety rules” promulgated well before the passage of the CPSIA. Unfortunately, because the Majority chose to view all consumer product safety rules of the Commission as potential “children’s product

⁸ <http://www.cpsc.gov/pr/northup110409.pdf>

⁹ <http://www.cpsc.gov/pr/northup03102010.pdf>

¹⁰ Justin Pritchard, “Feds dismiss need to recall lead drinking glasses,” *Associated Press*. December 11, 2010. http://news.yahoo.com/s/ap/20101211/ap_on_he_me/us_cadmium_lead_glassware

¹¹ <http://www.cpsc.gov/pr/northup09292010.pdf>

safety rules,” it imposed an unnecessary, additional layer of testing (at third-party labs) on manufacturers of carpets and rugs, vinyl, clothing textiles and mattresses—all of which are subject to consumer product safety rules. The Commission did not have to take this step—and there is no risk associated with these products that necessitates *new* third-party testing requirements.¹²

- **Public Database:** I proposed an alternative database rule that would have responded to a number of manufacturer concerns and made the database a more accurate source of information for consumers. The Commission’s Majority instead passed a rule that went well beyond the statute’s requirements, allowing “anyone” to submit reports of harm—even advocacy groups, attorneys, random bystanders, and, as has actually occurred, people perusing the internet that may not have firsthand knowledge of the incident. In total, the Commission Majority’s database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers--particularly small businesses.
- **Cribs:** In December 2010, the Commission set a six-month effective date for a new mandatory, retrospective crib rule that it was required to promulgate under the CPSIA. Beginning in April 2011, the Commission received appeals from associations representing hundreds of small and medium-sized crib retailers asking for an extension of time to sell through crib inventory that did not comply with the new standard and therefore could not lawfully be sold after June 28, 2011. Data received by the Commission from a small fraction of all crib retailers indicated that as of May 2011, there were at least 117,800 noncompliant cribs, valued at approximately \$32,000,000, still in retailer inventory. While I voted in favor of the new crib standard in December 2010 and the original six-month effective date for both retailers and manufacturers, I realized in hindsight that due to the chain of commerce, it was illogical to set the same effective date for both. Two weeks ago, the Commission held a public meeting to determine whether to extend by any amount of time the period during which retailers could lawfully sell new, non-drop-side cribs that satisfy the most recent voluntary standard. The Commission had previously given day care providers and the hospitality industry until December 2012 to meet the new mandatory standards, so there was no issue regarding the safety of the cribs that would have been the subject of the extended deadline. Nonetheless, the Commission decided on a 3-2 party-line vote not to extend the effective date by even 30 days, thus missing another opportunity to avoid unnecessary economic waste without sacrificing safety.
- **Reduction to 100 ppm of Lead:** The CPSIA banned as a hazardous substance children’s products containing over 300 ppm of lead. It also provides that children’s products containing over 100 ppm of lead shall be treated as a banned hazardous substance beginning on August 14, 2011, “unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category.” The Commission is scheduled to decide by majority vote on July 13,

¹² <http://www.epsc.gov/pr/northup07122010.pdf>

2011, whether reducing the lead limit to 100 ppm for any product or product category is not technologically feasible. Staff has prepared a public decisional package on the issue and presented its views during a public briefing held last week. During the briefing, staff acknowledged the common sense fact that the economic impact of reducing the limit to 100 ppm is a factor in determining the technological feasibility of doing so. In addition, staff has identified significant “economic impacts that are likely to occur”, including: the need to use more expensive low-lead materials rather than the nonconforming materials used today; the costs associated with reengineering products to make use of new materials; the costs of making leaded components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children’s products available to consumers; businesses exiting the children’s product market; manufacturers going out of business; reduction in the utility of products due to the substitution of materials; reduction in the durability of products due to the substitution of materials; and, the loss of the value of all inventory not satisfying the new standard. With respect to any potential counterweight to this economic harm, Commission staff concludes that the “overall contribution of” products with lead content between 100 ppm and 300 ppm “to lead exposure in children is minimal.” Notwithstanding staff’s acknowledgment that reducing the lead limit to 100 ppm will cause substantial economic harm with no offsetting improvement in product safety, I believe it is likely that the Commission’s majority will still vote to reduce the standard.

IV. Lack of a Regulatory Review

To my knowledge, the Commission has not undertaken a retrospective review of its regulations since before passage of the CPSIA in 2008, and on-going small businesses analyses are minimal. The Commission’s only evaluation of the impacts of its regulations on small businesses has been performed under the Regulatory Flexibility Act (RFA). Since I have been at the Commission, Regulatory Flexibility Analyses have been as perfunctory as one paragraph or as lengthy as a dozen pages – and the Commission seldom if ever bases its decisions on such analyses. As you know, the RFA also requires retrospective review of regulations, but only every ten years—and only if the Commission has deemed such rules to have a “significant” impact on small businesses.

Prior to the passage of the CPSIA, the Commission undertook a voluntary, annual review of certain regulations, including notice and comment to the public, in order to determine whether any should be rolled back or updated. From 2004 – 2007, the Commission reviewed 11 rules, standards and bans. I understand that those reviews resulted in modifications to only one of the rules – the flammability standard for carpets and rugs. In some cases, staff reviews of regulations produced recommendations for change, but the Commission never did the work necessary to implement them. Finally, a review of the bicycle standard done at that time also helped to inform some recent changes made to that standard, which were done principally to allow bicycle manufacturers to comply with the CPSIA’s testing and certification requirements.

V. Going Forward - Recommendations to Reform the CPSIA:

Reforming the CPSIA to focus on risk would greatly relieve the strain on agency resources caused by implementing and enforcing non-risk based regulations and monitoring low risk products. It would also free the agency to redirect its limited resources toward more effectively fulfilling its safety mission. This can be accomplished in a variety of ways:

➤ Amend the law's Absorbability Exclusion §101(b)(1)(A) so that it is meaningful:

The CPSIA included three statutory exclusions from the lead limits. But the Commission has meaningfully interpreted only two of them. The law's third exclusion, based on the absorbability of lead in a product, has not excepted a single product from the CPSIA's scope. 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.

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 CDC and the EPA. 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 tracked into a home or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the EPA 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, including bicycle handlebars where lead is embedded in the metal substrate and cannot be absorbed.

Unlike other Commission rules, regulations promulgated under the CPSIA, as interpreted by the Majority, have 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. But children are not likely to eat the pages of old books or ingest more than minuscule 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 her blood lead level.

If the law is amended to unambiguously exclude products with a level of absorbable lead that is not harmful to a child's health, the scope of the CPSIA will be considerably narrowed, and the Commission can focus its limited resources on real risks to children.

➤ Lower the age-range of products impacted by the law:

Under the CPSIA, a "children's product" is any product intended primarily for use by children twelve years old or younger. The CPSIA thus treats all products intended primarily for use by children under thirteen the same, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented by the same products to different age groups, CPSC staff have suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be one of the most efficient ways to amend the law in order to exclude those products which many believe should not be impacted.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcement difficulties over marginal products. Producers argue that the products are primarily intended for children age thirteen and older, and the Commission examines marketing and other factors to assess the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (*e.g.*, certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced as applied to products for older children who are well past the age when they mouth things or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children under age six, while giving the agency discretion to raise that age limit for particular materials or categories of products that are found in the future to pose a risk to older children. And in any event, the CPSC would retain the authority to issue a stop-sale order or to recall any product determined to pose "substantial product hazard" under the Federal Hazardous Substances Act.

➤ Eliminate third-party testing and certification requirements:

As stated previously, the law's third-party testing, certification, tracking and labeling requirements are the most burdensome for small manufacturers. They are also unnecessary for verifying compliance, particularly given the agency's improved traditional enforcement tools. As a result, Congress could eliminate current third-party testing and certification requirements all together, allowing manufacturers to test in-house and/or in the best way they know how to determine

compliance. The Commission would retain the discretion to impose third-party testing requirements on products whose risk justifies the cost.

- Public Database – require reforms to the Database Rule to ensure that incident reports are verifiable and useful.

Finally, the Commission’s Database Rule could be revised in order to ensure that incident reports going up on the new, public database are verifiable. Potentially inaccurate and unverifiable information is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information.

Several features of the Majority’s rule guarantee a database populated by inaccurate information. The Majority has broadly defined the statutory categories of submitters to the Database to include groups and individuals with no direct knowledge of the incident or the person harmed. Such groups include consumer advocacy groups, trade associations and attorneys, for whom the accuracy of the incidents they report may be secondary to their own agendas, giving them no incentive to avoid the posting of false or misleading information.

The Database Rule also does not require sufficient information from the submitter to ensure that Commission staff or consumers can tell one type of product from another. Only the minimal amount of information is required, including manufacturer name and a “description of the product” which could include simply “baby stroller.” But one company may have manufactured dozens of different models of baby strollers, some of which may no longer be in production. As a result, the limited product information required is insufficient to permit the Commission to investigate the claim, and of no value to a consumer seeking to identify a safe model of baby stroller.

The problems created by permitting inadequate product identification and allowing individuals and groups without firsthand knowledge to report alleged incidents of harm, are compounded by the rule’s failure to require the identification of the victim or product owner who experienced the risk of harm. As a result, the Commission’s staff may be unable to verify the accuracy of the report by speaking to the only party with actual knowledge of the product and incident. Moreover, because manufacturers bear the burden of proving a material inaccuracy, the Commission will publish a report that contains the minimal required information, even where inadequate product identification or the absence of victim contact information leaves the report unverified. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the

manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Inaccurate information will likely also be posted on the database - at least temporarily - even when there is sufficient information to eventually confirm the truth. That is because the Majority's rule requires the Commission to publish an incident report on the public database by the 10th day after sending notification to the manufacturer, notwithstanding that a manufacturer has adequately supported a claim that the report is materially inaccurate. Unless the Commission can conclude within 10 days that the report is materially inaccurate, it is published on the 11th day and remains on the Database while the Commission completes its investigation. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely.

Thank you, Chairman and Members of the Subcommittee for calling this hearing and for inviting me to testify today on the burden to the economy of the CPSIA's non-risk-based regulations. I look forward to your questions.

ECONOMIC IMPACT OF THE CPSIA - EXAMPLES 2009 - 2011

Costs associated with the CPSIA

1. In a letter from the CPSC to Representative Dingell in March 2009, Commission staff reported that the overall economic impact of the CPSIA would be in the “**billions of dollars range**.” The Commission also acknowledged that the testing and certification costs will fall disproportionately on small-volume businesses. (*Letter from Acting Chairman Nancy Nord to Representative Dingell, March 20, 2009*)

2. “**MAJOR RULE**” - CPSC acknowledges in its FY 2011 Regulatory Agenda that its main rule pertaining to the CPSIA’s testing requirements ([\[PDF\] CPSC Docket No. CPSC-2010-0038](#)) is a “major rule” under the Congressional Review Act, resulting in, or likely to result in: 1) an annual effect on the economy of \$100,000,000 or more; 2) a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

3. In an article entitled “Makers Are Pushing Back on Toxic-Toy Law” (*Wall Street Journal*, March 5, 2009 <http://online.wsj.com/article/SB123621357629835121.html>), Joe Periera reported the following loss statistics:
 - Goodwill Industries to destroy **\$170 million** in merchandise.
 - Salvation Army expects to lose **\$100 million** in sales and disposal costs.
 - The Toy Industry Association estimates inventory losses at **\$600 million**.
 - Members of the Coalition for Safe and Affordable Childrenswear lost **\$500 million**.
 - The California Fashion Association estimates troubled inventory at **\$200 million**.
 - The Motorcycle Industry Council expects to lose 50,000 motorized bikes and four-wheelers worth at least **\$125 million**.

4. On March 11, 2009, *Playthings Magazine* reported updated data from the Toy Industry of America (see <http://www.playthings.com/article/CA6643505.html>), including:

- From a pool of nearly 400 manufacturers and 220 retailers, the TIA estimates **losses of \$2 billion in retail value**.
- More than **\$1 billion** in already shipped merchandise has been returned or is being withheld for return.
- More than **\$800 million** in compliant merchandise is at risk of return.
- **40%** of all respondents plan to eliminate jobs to pay for the CPSIA, with more than 1200 jobs reported to be in jeopardy.

“TIA: Safety Act puts \$2B crimp in toy biz”

3/11/2009

5. Separately, the Motorcycle Industry Council advised that total losses from disruptions in its members’ businesses could total **\$1 billion**. See: <http://1st5ive.com/new-lead-rule-could-cost-motorcycle-industry-1-billion-annually.html>
6. In May 2011, the Commission learned that there were at least 117,800 safe, but non-compliant, cribs nationwide that retailers possessed in inventory that would have to be disposed of by June 28th due to the retroactive effects of the CPSIA-mandated crib standard. The Commission could have modestly extended the effective date for retailers to avoid unnecessary, substantial economic losses from the disposal of safe, brand-new cribs; but it declined to provide such relief. The known potential losses at the time: 117,800 X \$275 (estimated wholesale price/crib) = \$32,395,000. <http://www.cpsc.gov/pr/northup06272011.pdf>

Examples of businesses closed due to CPSIA

Most names provided by the Handmade Toy Alliance

1. Whimsical Walney, Inc. – Santa Clara, CA
2. Fish River Crafts – Fort Kent, ME
3. Kungfubambini.com – Portland, OR
4. Baby Sprout Naturals – Fair Oaks, CA <http://www.babysproutnaturals.com/about/>
5. Gem Valley Toys – Jenks, OK
6. Angel Dry Diapers – Michigan
7. Abracadabra Educational Craft Kits for Kids – Bend, OR
8. Hailina’s Closet – Ellensburg, WA (thrift store)
9. Eleven 11 Kids
10. Perfect Circle Consignment – Bremerton, WA
11. JenLynnDesigns
12. A Kidd’s Dream – Conway, AK
13. Storyblox – New Vienna, OH
14. Phebe Phillips, Inc. – Dallas, TX <http://www.phebephillips.com/shopnow.htm>
15. Pops Toy Shop - mountains of Tennessee, Virginia, North & South Carolinas

14. Hands and Hearts History Discovery Kits – Greenwood, SC
15. The Lucky Pebble – Kailua, HI
17. My Sister’s Closet – Arizona
18. Honeysuckle Dreams
19. Sullivan Toy Co.

Businesses that have stopped production of certain children’s lines due to CPSIA

Most names provided by the Handmade Toy Alliance

1. Creative Artworks – Greenwood, AK
2. Craftsbury Kids – Montpelier, VT
3. “Pockets of Learning” *Special Needs Products Being Driven from Market By Testing Costs – Rhode Island*
4. Creative Learning Connection
5. Giverny, Inc / Mini Me Geology
6. HABA
7. Challenge & Fun, Inc. -
<http://online.wsj.com/article/SB10001424052748703478704574612573263963560.html>
8. Hands and Hearts Far East History Discovery Kit – Greenwood, SC
9. Moon Fly Kids – Las Vegas, NV

10. Louisville Slugger ® – Louisville, KY

Businesses that closed and list the CPSIA as one of the factors

Most names provided by the Handmade Toy Alliance

1. Due Maternity – San Francisco, CA
2. Frog Kiss Designs – Fairfield, CT
3. Waddle and Swaddle – Berkley, CA
4. Lora’s Closet – Berkley, CA
5. Baby and Kids Company – Danville, CA
6. Baby and Beyond – Albany, CA
7. Obabybaby – Berkley, CA
8. Bellies N Babies – Oakland, CA
9. Oopsie Dazie
10. Bears on Patrol – not a business, but program by police departments to hand out stuffed animals to scared children -
<http://learningresourcesinc.blogspot.com/2009/10/cpsia-cpsia-casualty-of-week-for.html>
11. Simple Treasures

Other companies hurt by retroactivity of the CPSIA’s lead content and phthalates bans:

1. Gymboree – “change in safety requirements related to levels of phthalates rendered about 1.7 million of its inventory obsolete”
 - i. <http://www.reuters.com/article/idUSBNG44760220090305>
2. Constructive Playthings, Inc – “We have millions of dollars worth of merchandise sitting in 30 40-foot-long trailers waiting to be hauled out to a landfill somewhere," says Michael Klein, president of Constructive Playthings Inc...The banned products include beach balls, inflatable toy guitars and blow-up palm trees.’ <http://online.wsj.com/article/SB123621357629835121.html>
3. Louisville Slugger ® – Destruction of \$500,000 in safe, non-compliant inventory (baseball bats) due to the retroactive effects of the law

Businesses no longer exporting to the U.S. due to the CPSIA

Most names provided by the Handmade Toy Alliance

1. Hess – Germany
2. Selecta – Germany <http://www.zrecommends.com/detail/breaking-news-selecta-to-cease-us-distribution-due-to-cpsia/>
3. Finkbeiner – Germany
4. Saling – Germany
5. Simba – Germany
6. Bartl GmbH dba Wooden Ideas – Germany
7. Woodland Magic Imports – France
8. Brio
9. Helga Kreft – Germany
10. Eichorn – Germany
11. Kapla
12. Kallisto Stuffed Animals

EuroToyShop – On this company’s homepage, you will find links at the bottom with a list of “endangered toys” or “extinct toys” that are still sold to children in Europe but which the company will no longer be able to sell in the U.S. due to the CPSIA.

Endangered Toys The CPSIA (Consumer Product Safety Improvement Act) has unintended consequences. Now, some European toys are no longer available in the USA.

<http://www.eurotoyshop.com/>

Associations that have voiced concerns to the Commission regarding CPSIA’s costs (list is not exhaustive):

Association of Home Appliance Manufacturers

International Sleep Products Association
Retail Industry Leaders Association
Specialty Graphic Image Association
American Coatings Association
The Carpet and Rug Institute
National Retail Federation
Association of American Publishers
Consumer Healthcare Products Association
Toy Industry Association
Glass Association of North America
American Honda Motor Company, Inc.
Society of the Plastics Industry, Inc
American Home Furnishings Alliance
Sporting Goods Manufacturers Association
Handmade Toy Alliance
Consumer Specialty Products Association
Footwear Distributors and Retailers
Fashion Jewelry Association
Craft and Hobby Association
National Association of Manufacturers
Halloween Industry Association
American Apparel and Footwear Association
Juvenile Products Manufacturers Association
National School Supply and Equipment Association
National Federation of Independent Business
Promotional Products Association International
Bicycle Product Suppliers Association

Killing Small Businesses: CPSIA in the News, Letters and Public Comments

A MESS OF A LAW:

March 11, 2011

“President Obama has been on a campaign to shake his antibusiness reputation, so a good place to start would be to revisit the Consumer Product Safety Improvement Act, a mess of a law that has put new burdens on small businesses...”

<http://online.wsj.com/article/SB10001424052748703408604576164510202890494.html> “Get the Lead Out, Sir,” *The Wall Street Journal*, March 11, 2011. Editorial.

HIGHER COSTS FOR SCHOOLS:

January 11, 2010

“NSSEA members sell educational supplies, equipment and instructional materials to schools, parents, and teachers...”

... the costs to schools, municipalities, libraries, and others of identifying and replacing such books would be extremely high and there is no reason to impose such costs given the lack of identifiable risk.

... While we applaud the efforts the CPSC has made to find solutions for small businesses... we believe the CPSC could do more if given more discretion by Congress. The alternative is the elimination of many valuable educational toys and products, some manufactured in low volume for niche markets (such as the deaf, blind, or otherwise differently-abled children) and typically not supplied by the huge multi-national toy manufacturers.”

Letter from the NSSEA (National School Supply and Equipment Association) to
Commissioner Northup, January 11, 2010

HIGHER COSTS FOR PRODUCTS WITH NO LEAD RISK:

October 13, 2010.

“The government wants to regulate Hannah Montana CDs and DVDs. The bureaucrats at the Consumer Product Safety Commission (CPSC) insist that the discs marketed to children be tested for lead, but when the same young starlet churns out raunchier material under her real name, Miley Cyrus, they will escape scrutiny. Never mind that the same 10-year-olds will likely end up buying both products.

“...Never mind that Hannah Montana's fans aren't likely to eat their DVDs, the latest red tape makes no distinction between products where lead is likely to be consumed and those where it isn't.”

<http://www.washingtontimes.com/news/2010/oct/13/bureaucrats-way-out-of-tune/>
“Bureaucrats way out of tune,” *Washington Times*, October 13, 2010.

PUNISHING SMALL BUSINESSES, WHILE MATTEL AND THE BIG GUYS SQUEEZE OUT THE COMPETITION:

June 17, 2010

"Now [Mattel](#) is testing and making toys without any trouble at all, and those of us who were never the problem are in danger of losing our businesses," says Hertzler, who runs EuroSource, based in Lancaster, Pa., with his wife and two sons...

“Nearly two years after the safety law was enacted, Congress and the Consumer Product Safety Commission are still struggling to reduce its burden on small businesses while eliminating the risk of lead and phthalates in children's products.”

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_ST_N.htm “Lead testing can be costly for mom and pop toy shops,” *USA Today*, June 17, 2010

BORDERING ON RIDICULOUS:

June 17, 2010

... "What the law should be about is ensuring safe products," says Edward Krenik, a spokesman for the children's product alliance. "We've crossed over into ridiculousness."

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_ST_N.htm “Lead testing can be costly for mom and pop toy shops,” *USA Today*, June 17, 2010

REGULATION FOR REGULATIONS' SAKE

November 8, 2010

“Regulation for regulations’ sake, where there is no inherent change to a bill of materials, a process or a product indicated after extensive, statistically significant testing across multiple points of input and verification, is simply wasteful.”

American Home Furnishings Alliance
November 8, 2010 – Letter to Commissioners

MATTEL FINDS CPSIA A CHALLENGE – HOW MUCH MORE FOR SMALL BUSINESSES?

November 9, 2009

“Officials of the toy manufacturer, Mattel, met separately with two CPSC commissioners November 3 to talk about how challenging it was for Mattel to comply with the CPSIA...

Peter Biersteker, a lawyer for Mattel with the law firm Jones Day in Washington D.C., said his client is finding the CPSIA difficult to decipher... "It's a lot of work. I don't know how smaller companies do it," Biersteker told Commissioner Robert Adler.

Despite Mattel's large team of in-house lawyers, he said, the company needed to hire outside lawyers to help understand the CPSIA. He said Mattel holds weekly conference calls on the issue, discussing how to comply with the act while remaining "cost competitive."

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

COMMISSION ACTION ADDS TO CPSIA'S PROBLEMS:

August 16, 2010

“The latest dictates from the [Consumer Product Safety Commission \(CPSC\)](#) will drive up the cost of manufacturing products intended for children. The agency adopted a pair of new rules in July and August implementing the Consumer Product Safety Improvement Act of 2008, but as drafted, these regulations will force companies to waste time and money on redundant testing programs solely for the entertainment of bureaucratic busybodies.

... The redundant examinations, mostly checking flammability, can be prohibitively expensive. For instance, the regulations could require a manufacturer to build a queen-sized-bed prototype of a baby's crib just so it can be tested in an independent lab. Yet each of the component parts - the crib-sized mattresses, blankets and all other component parts - already are individually tested for the same hazards when manufactured.”

Editorial: “The Red Tape Stimulus,” *Washington Times*, August 16, 2010
<http://www.washingtontimes.com/news/2010/aug/16/the-red-tape-stimulus/>

EVEN THE NEW YORK TIMES SPOTLIGHTS THE UNINTENDED CONSEQUENCES OF THE CPSIA:

September 28, 2010

“... a new federal crackdown on dangerous toys has left some in the industry crying foul and not wanting to play.”

“...Critics point to provisions in the law that they deem ludicrous. For instance, a paper clip that is included in a science kit for schoolchildren would have to be tested for lead. But a teacher can walk into any drug store and buy a box of paper clips that would not be subject to the same testing.

Similarly, a lamp that is festooned with cartoon characters would have to be tested, but a lamp without the characters would not.”

<http://www.nytimes.com/2010/09/29/business/29toys.html> “Toy Makers Fight for Exemption From Rules,” *New York Times*, September 28, 2010

SCIENCE KITS ARE “NOT BANNED” – BUT THE TOOLS USED INSIDE THEM ARE!

October 1, 2010

“The science kit makers had asked for a testing exemption for the paper clips and some other materials. On Wednesday, in a close 3-2 vote, the commission declined to give them the waiver they sought.”

“...After the science kit vote, CPSC Chairman Inez Tenenbaum sought to reassure people that, "There is nothing in this rule that bans science kits."

Right. But while the commission vote doesn't ban the kits, manufacturers say it may crimp the supply of kits for elementary school children.”

<http://www.lvrj.com/opinion/goodbye-to-chemistry-sets-104139059.html>
“Goodbye to chemistry sets,” *Las Vegas Review Journal*, October 1, 2010.
Editorial.

FURNITURE MANUFACTURERS FACED WITH ADDED COSTS, ZERO SAFETY BENEFIT TO CHILDREN:

November 8, 2010

“...there has not been a corresponding benefit in the improved safety of children’s furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children’s product lines since they began testing to CPSIA in 2008....The testing is simply being done to attempt to prove a negative.”

American Home Furnishings Alliance

November 8, 2010 – Letter to Commissioners

FURNITURE MANUFACTURERS FACED WITH ADDED COSTS, FORCED TO CUT JOBS:

November 8, 2010

“The majority of the annual costs will be in the record keeping requirements because none of the companies have the requisite IT infrastructure to handle the tracking of test reports per batch...Hooker estimates that it will cost them from \$350,000 to \$400,000 per year. Furniture Brands International said this will cost them over \$4.5 million per year which is more than the profits from their best quarter in the last 2.5 years. In addition, this company must invest an additional \$2 million in start up costs for setting up the production testing, programming computer systems to work with existing systems, and hiring and training employees for the administration of the CPSIA.”

To offset these new costs, the company is forced to consider these choices: 1) shut down a small domestic plant which will mean the loss of 64 full time and 30 temporary US jobs; 2) shut down a larger domestic plant which will mean the loss of 384 US jobs; 3) significantly increase prices to offset the loss in revenue making them less competitive; 4) offer a lower quality product... or 5) shut down all domestic production which incorporates any finishing processes, which will mean the loss of approximately 460 US jobs.”

American Home Furnishings Alliance
November 8, 2010 – Letter to Commissioners

NO MORE MOM AND POP TOY SALES:

July 7, 2010

“The second program involves making wooden toys that are given to the church and other charitable organizations in the county for distribution to needy children throughout the year especially at Christmas. Last year we created over 700 toys. The idea that we now are required to have these handcrafted toys certified will bring the program to a halt.”

Dupage Woodworkers, Downers Grove, IL (July 7, 2010, Public Comment, Testing rule)